

# OUTLAWS and ANGELS: Tips for Success in Your Workers' Compensation Case

A View from *Beside*  
the Bench

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Staff Attorneys



Building a Better Tomorrow



Who we are/  
what we do/  
what we *don't* do

# What we do:

- Trial Court Staff Attorneys:



# What we do:

## Trial Court level:

- Organize files.
- Attend the hearings, observe, take notes, help draft the resulting order.
- Review motions, discuss them with the Chief Judge, help draft order.
- Draft orders on status conferences and other non-evidentiary hearings.
- Schedule hearings.
- Answer questions from self-represented parties and counsel.
- Proofread draft orders from all judges.
- Administer the blog.
- Legal research for Chief Judge.
- Keep the Chief Judge organized.
- Serve as a sounding board/devil's advocate.

# What we do:

- Appeals Board Staff Attorneys:
  - Assist in drafting proposed opinions.
  - Draft proposed orders disposing of motions.
  - Proofread/edit.
  - Track cases for oral argument.
  - Research.
  - Assist in preparing presentations.

# What we *don't* do:

- Staff attorneys in both courts don't:
  - Decide cases.
  - Decide how to handle a motion.
  - Give legal advice.
  - Engage in ex parte communications.
  - Interpret the law.
  - Interpret our courts' cases.

# Petition for Benefit Determination

## *Outlaw: Inaccuracies in your PBD*

Tell us about the injury; include how and where the injury occurred, the body part(s) injured, and the work that was being done. Include the names of all persons involved or who witnessed the accident. Be as specific as possible. Also, please attach any documents you have, such as accident reports or medical records, which support your claim. The alleged injury occurred in the following manner: (Attach additional sheets if necessary.)

During the normal course and scope of employment, Claimant was making a bed by pulling the sheets down and lifting up the mattress, when she injured her right shoulder. She reported her injury to her employer the day after it happened.

# Notice of Appeal-How to be an Angel

- Identify each issue you are appealing. Don't risk waiver of an issue.
- File it timely. The notice of appeal is jurisdictional. If it is not filed timely, the Appeals Board does not have jurisdiction.
- Don't use outdated forms. Use the version currently appearing on the website.



# Mediation/Dispute Certification Notice

Tenn. Comp. R. & Regs. 0800-02-21-.11; § 50-6-236

## ***Angel: Communicate with the mediator***

The August 30, 2017 settlement demand letter *in toto* from my office to you for mediation purposes only is an inadmissible offer to settle under the Tennessee Rules of Evidence and should be excluded from the technical file. Obviously, the Court is able to perform its own mathematical computations at trial, should that be its desire.

## ***Outlaw: “Global” defenses***

Employer reserves the right to assert such other defenses as may arise through the course of further investigation in the discovery process.

# Mediation/Dispute Certification Notice

## TABLE OF CONTENTS

***Angel: Organized  
medical records;  
Tenn. R. & Regs.  
0800-02-21-  
.16(6)(a) and the  
Standing Order***

PAGES 1-4:	Crossroads Medical Group ( 7/31/17) Page 4: Right ankle x-rays
Pages: 5-33:	Tennessee Orthopaedic Alliance ( 8/2/17-9/27/17)
Pages 34-36:	Operative Report (8/16/17)
Pages 37-39:	Off work Notes Page 37: Off work from 7/31/17-10/6/17 Page 38: Off work – 10/6/17- Until further notice Page 39: Off work – 8/1/17-11/30/17

# Transcript/Joint Statement of the Evidence

- If you don't want to file a transcript, file a joint statement of the evidence.
  - Key word: “joint.” A “statement of the evidence” that is not agreed to by the parties AND approved by the trial judge is, if anything, a brief.
  - Interlocutory appeal: Tenn. Comp. R. & Regs. 0800-02-22-.02(1)
  - Compensation appeal: Tenn. Comp. R. & Regs. 0800-02-22-.03(1)

# Transcript/Joint Statement of the Evidence

## Outlaw behavior

“Without a transcript or statement of the evidence, we cannot know what evidence was presented to the trial court beyond the exhibits that were admitted into evidence and the testimony as summarized in the trial court’s order. Review of a trial court’s decision is accompanied by a presumption that the factual findings are correct. . . . [A]n incomplete appellate record is fatal to an appeal on the facts, and a reviewing court must conclusively presume that the evidence presented supported the facts as found by the trial court. In cases where no transcript or statement of the evidence is filed, the appellate court is required to presume that the record, had it been properly preserved, would have supported the action of the trial court.” *Moffitt v. Allied Metals Co.*, No. 2016-02-0282, 2018 TN Wrk. Comp. App. Bd. LEXIS \_\_ (Tenn. Workers’ Comp. App. Bd. Apr. 30, 2018) (citations and internal quotation marks omitted).

# The Record-How to be an Angel

- Don't submit documentation to the Appeals Board that you did not submit to the Court of Workers' Compensation Claims.
- If there is a problem with the record, cure it in the trial court. File a motion; preserve an objection.
- “[W]e will not consider on appeal testimony, exhibits, or other materials that were not properly admitted into evidence at the hearing before the trial judge.” *Hadzic v. Averitt Express*, No. 2014-02-0064, 2015 TN Wrk. Comp. App. Bd. LEXIS 14, at \*13 n.4 (Tenn. Workers' Comp. App. Bd. May 18, 2015).
- We also will not address issues not addressed by the trial court. Failure to raise an issue at the hearing usually constitutes waiver of the issue on appeal.

# Request for Expedited Hearing

***Angel: Call/e-mail to schedule***

Good afternoon,

Will you please send me additional dates for a scheduling hearing?

I haven't been able to get a response from the defense attorney.

Thanks,

***Outlaw (sort of):  
Excess pleadings***

## JOINT SUPPLEMENTAL PROPOSED HEARING DATES

It appearing to the court, as evidenced by the signature of respective counsel, that the parties are in agreement that the proposed hearing dates should be amended to the following:

- Thursday, July 12, 2018 at 1:00PM;
- Wednesday, July 25, 2018 at 1:00PM;
- Thursday, July 26, 2018 at 1:00PM; and,
- Friday, July 27, 2018 at 1:00PM.

RESPECTFULLY SUBMITTED

# Affidavit

Tenn. Comp. R. & Regs. 0800-02-21-.14(1); *Hadzic v. Averitt Express*

***Angel: Meaningful, succinct statement of the critical facts***



STATE OF TENNESSEE  
BUREAU OF WORKERS' COMPENSATION  
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT

Employee: \_\_\_\_\_

State File No.: 29251/2016

Employer: \_\_\_\_\_

Docket No.: 2017-06-0219

Date of Injury: 04/16/2016

**AFFIDAVIT**

Comes the affiant, \_\_\_\_\_ and deposes and testifies as follows:

1. I am over eighteen years of age and of sound mind.
2. This affidavit is based upon my own personal knowledge.
3. On April 16, 2016, I was working for \_\_\_\_\_ when I was cranking an old dolly and felt a pop in my right shoulder with immediate onset of pain. As a result, I sustained an injury to my right shoulder which has caused the need for medical treatment. I provided proper notice to my Employer upon injury. I have never had any prior problems or limitations with my right shoulder. Prior to this injury, I had full range of motion without pain in my right shoulder. I was referred to Dr. Glenn through workers compensation and he was authorized to treat my right shoulder initially. Dr. Glenn has since recommended that I undergo a total shoulder replacement in order to resolve my symptoms that have developed following this injury. Conservative care such as physical therapy and injections have provided little to no relief. Workers compensation has denied me any further medical and temporary benefits related to my right shoulder. I sought to return to work as I had no income once the Employer/Carrier denied my claim. I am seeking medical benefits including but not limited to the treatment recommended by Dr. Glenn.

# Appellate Briefs

- At the risk of stating the obvious, file one.
  - Don't simply file the same brief with the Appeals Board that you filed in the trial court.
  - Provide authority for your arguments and include the citation.
  - Proofread.
  - Rules and regulations
    - Interlocutory appeals: Tenn. Comp. R. & Regs. 0800-02-22-.02(2)
    - Compensation appeals: Tenn. Comp. R. & Regs. 0800-02-22-.03(3)
    - Practices and Procedures § 5



# Appellate Briefs: Standard of Review

## Outlaw Behavior

“[W]e note that [litigant] cites Tennessee Code Annotated section § 50-6-217(a)(3) (2016) (repealed 2017) in support of its argument . . . . Section 50-6-217(a)(3) authorized us to reverse or modify a trial court’s decision if the rights of a party were prejudiced because the findings of the trial judge were ‘not supported by evidence that is both substantial and material in light of the entire record.’ However, as we have noted on numerous occasions, this code section was repealed effective May 9, 2017. Consequently, as noted above, the standard we apply in reviewing the trial court’s decision presumes that the trial judge’s factual findings are correct unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-239(c)(7).”

# Filing Documents

***Outlaw: (More)  
excess pleadings***

## **NOTICE OF DEPOSITION**

PLEASE TAKE NOTICE that, pursuant to TRCP Rule 30, the deposition of Michael LaDouceur, M.D. shall be taken upon oral examination before a Notary Public or other officer authorized by law to take depositions, at the office of Advanced Orthopaedics and Spine, 5651 Frist Boulevard, Suite 200, Hermitage, Tennessee 37076 on **Friday, February 9, 2018 at 9:30 a.m. C.S.T.**, and shall continue from day to day thereafter until completed.

# Trial Court Briefs

## ***Outlaw: Outdated authority***

### STATEMENT OF THE LAW

The employee in a workers' compensation case has the burden of proving every element of her claim, including causation, by a preponderance of the evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935, 937 (Tenn.1987). Except in the most obvious, simple and routine cases, “a claimant must establish by expert medical evidence the causal relationship” between

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requested medical treatment and a work injury. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn.1991). Further, proof of causation “shall not include the aggravation of a preexisting disease, condition or ailment unless it can be shown to a reasonable degree of medical certainty that the aggravation arose primarily out of and in the course and scope of employment.” *T.C.A. § 50-6-102*. In addition to the causation burden, an Employee seeking temporary total disability benefits must show she was disabled by the work injury and not able to work during the time period benefits are requested. See *Gray v. Cullom Machine, Tool & Die, Inc.*, 152 S.W.3d 439, 443 (Tenn.2004); *DeMorato v. Cherokee Ins. Co.*, No. W2014-01262-SC-R3-WC, 2015 WL 5313181, at \*5 (Tenn. Workers Comp. Panel Sept. 10, 2015).

# Trial Court Briefs

## ***Angel: New law***

### LEGAL CONSIDERATIONS

In order to obtain the requested relief of medical benefits and temporary disability benefits, Mr. [redacted] bears the burden of proof on all essential elements of his claim. *Scott v. Integrity Staffing Solutions*, No. 2015-01-0055, (Tenn. Workers' Comp. App. Bd. August 18, 2015), at \* 6. At an expedited hearing he has the burden to come forward with sufficient evidence from which the trial court can determine he is likely to prevail at a hearing on the merits. *McCord v. Advantage Human Resourcing*, No. 2014-06-0063, (Tenn. Workers' Comp. App. Bd. Mar. 27, 2015), at \*7-8, 9; T.C.A. § 50-6-239(d)(1) (2015).

The Tennessee Workers' Compensation Board of Appeals has addressed work-related aggravations of pre-existing conditions in the context of the 2013 Reform Act:

[T]o qualify for medical benefits at an interlocutory hearing, an injured worker who alleges an aggravation of a preexisting condition must offer evidence that the aggravation arose primarily out of and in the course of employment. See Tenn. Code Ann. § 50-6-102(13)(A) (2015). Moreover, the employee must come forward with sufficient evidence from which the trial court can determine that the employee would likely establish, to a reasonable degree of medical certainty, that the work accident contributed more than fifty percent in causing the aggravation considering all causes. See Tenn. Code Ann. § 50-6-102(13)(B-C). Finally, an aggravation or exacerbation need not be permanent for an injured worker to qualify for medical treatment reasonably necessitated by the aggravation.

*Miller v. Lowe's Home Centers, Inc.*, No. 2015-05-0158 (Tenn. Workers' Comp. App. Bd. Oct. 21, 2015), at \*6.

# Trial Court Briefs

## *Angel: Citations to the record*

On January 4, 2016, [redacted] was working as a line operator. [redacted] Dep. p. 61]. While the line operates automatically, the operator is responsible for ensuring that the line is correctly running product. [redacted] Dep. p. 61; [redacted], Dep. pp. 11-12]. On that date, [redacted] was asked by his supervisor to clean out a drain, as there was water accumulating on the floor [redacted]

# Evidentiary Hearings

Angel:

- Arrive early.
- Treat the self-represented employee respectfully.
- Dress appropriately (client and court reporter, too).

Outlaw:

- Admit to the judge, “I didn’t know you have rules,” or, “I didn’t read that case.”
- Wink at the judge after an evidentiary ruling favoring your client.
- Tell the court reporter in the judge’s presence that you’ll need a transcript.

# Oral Argument

- The Appeals Board tries to be as accommodating as possible.
- Only appellate tribunal that attempts to schedule oral argument around the parties' schedule.
- Held generally once a quarter, rotating between grand divisions.
- Next argument is July 10 at 6:00 p.m. at Nashville School of Law.

# Oral Argument-How to be an Angel

- Arrive at the beginning of the docket. Being late will mean you miss important instructions.
- The Appeals Board will have read the entire record on appeal, so manage your time accordingly.
- If a judge asks you a question, do not deflect.
- If it is your first time arguing before the Board, tell them. They *might* be a little more lenient.



# Oral Argument

- Take the process seriously. Just as a case can be won at oral argument, it can also be lost at oral argument.
- Stick to the facts and the law. Leave personal attacks on the other party, the other lawyer, the trial court judge, and the Appeals Board judges at the door.
- Know your case. The judges will know the record and they will recognize misstatements of the evidence and/or the law.

# Motion Practice: Continuances

## Prac. & Proc. Rule 2.02

***Angel: Adequate explanation of  
“good cause”***

9. The Parties' efforts to complete the medical proof in this case have been foiled by three (3) national holidays, the busy schedules of both Parties' IME physicians, and at least one (1) snow storm.

# Motion Practice: Discovery Disputes

## Angels:

- File a motion not another PBD; may be filed before a DCN issues.
- Make a good-faith effort to resolve; Tenn. Comp. R. & Reg. 0800-02-21-.16(2)(c).
- Follow the rules on length of discovery; Tenn. Comp. R & Regs. 0800-02-21-.16(4)(c).

## Outlaws:

- Attach the same set of interrogatories multiple times.

# Motion Practice: Summary Judgment

## Angels:

- Call/e-mail to schedule a date at least 37 days out from when you plan to file; include a hearing notice when you file.
- Give the self-represented employee a copy of Rule 56.

# Motion Practice: Summary Judgment

## ***Outlaw:***

***Compound/multiple***

***sentences/legal***

***conclusions in a***

***Statement of Undisputed***

***Material Facts***

32. Dr. Cook's assessment was right knee pain, arthritis, possibly a loose body and contusion. (*Id.* at 17.) Dr. Cook based his assessment "just" on Plaintiff's reporting, as these issues were not reflected on the MRI. (*Id.*) Regardless, she was convinced something was loose in her knee and was interested in proceeding with an exploratory arthroscopy. (*Id.* at 17-8.) Dr. Cook testified the medical records state the reason for the arthroscopy was "loose body" even though the MRI report did not show this, as it was the only diagnosis available that would justify the arthroscopy she "insisted on." (*Id.* at 40.)

# Appellate Motion Practice

- Helpful “rule”: how would I do it if I were appealing from Chancery or Circuit Court?
  - Case settled after notice of appeal
  - Need additional time
  - Request oral argument
  - Seeking clarification
  - Expand the length of the brief
  - Any other relief
- File a motion

# Appellate Motion Practice

- Remember, once notice of appeal has been filed, jurisdiction over the case generally vests in the Appeals Board.
- Trial court cannot rule on motions, conduct hearings, approve settlements, or generally conduct business absent a remand from the Appeals Board.
  - Exception to the rule: Tennessee Rules of Appellate Procedure, Rule 4(e). Timely filed motion pursuant to TRCP 50.02 (directed verdicts), TRCP 52.02 (motion to amend or make additional findings of fact), TRCP 59.07 (new trial), 59.04 (motion to alter or amend judgment)
  - Addressed by the Appeals Board in *Watson v. Labor Smart*, No. 2015-06-1358, 2017 TN Wrk. Comp. App. Bd. LEXIS 13 (Tenn. Workers' Comp. App. Bd. Feb. 3, 2017).

# A Parting Thought

Your reputation matters!

## ***Outlaw: Poisoning the Well***

With the above said, US Healthworks referred Employee to a neurologist for further examination and testing as a result of the initial visit. Additionally, US Healthworks ordered an MRI and CT-Scan **pursuant to Employee's request**. The MRI and CT-Scan were scheduled for the day after her visit, but Employee failed to attend her appointment. She has since relayed that she began hallucinating and “seeing snakes” the morning of her diagnostic testing. **Therefore, she was involuntarily institutionalized for three days by her neighbors for non-work related psychiatric problems.**



# A Parting Thought

Additionally, Employee's medical records show an extensive treatment history for bipolar disorder, hallucinations, and probable drug abuse. Therefore, it is difficult to ascertain which of her alleged symptoms are even legitimate and which complaints are the result of her probable somatoform disorder. Furthermore, Employee has failed to provide any medical evidence that would contradict Dr. Graham's causation opinion. Employee stated in her lengthy hand-written affidavit that the treating doctors at Vanderbilt told her the motor vehicle accident was not the cause of her occipital fracture. However, Employer has been unable to locate any sort of medical opinion or comment that supports Employee's allegation. In fact, the records seem to indicate the treating physicians were not certain that Employee even had an occipital fracture. But, even if said fracture exists, the doctors "Impression" from the medical file states the possible occipital fracture was secondary to her motor vehicle accident.

For the foregoing reasons, Employer respectfully requests that Employee's request for an expedited hearing and a ruling on the record be denied.

# Parting Thoughts

- Read the Rules
- Read the Practices and Procedures
- Your reputation matters



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# Questions?

# Thank you



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